APPENDIX TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Excerpts from Appellant's Reply Brief to the Court of Appeals

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POINT I

The Court below erred in substituting a hard and fast rule for the judgment of the Gasbras Sul's captain.

Esso's brief stresses the non-controversial point that the master of the Gasbras Sul was bound to conform to the standard of a reasonably prudent, competent shipmaster, acknowledging (Brief, pp. 3-4) that the applicable standard of prudent conduct is a question of law. But in analyzing the decisions taken by Captain Dahle, the Court below, and Esso, apply standards which the evidence as well as reason establish to be inapplicable.

1. Esso's argument attempts to sustain the decision below by its own bootstraps.

Esso reiterates (Brief, pp. 5-6) that Captain Dahle's decision to remain overnight because of the dangers of trying to leave in bad weather in the dark cannot be excused because "the situation was of the Master's own making". The fallacy in this reasoning was what prompted us to take up in reverse chronological order in our Main Brief (pp. 4 *et seq.*) the decisions criticized by the Court below, because if any one of those decisions had been negligent, the reasonableness of any subsequent decision would be entirely irrelevant. That is, each of the three decisions as to which the Court below disagreed with the Gasbras Sul's captain must be considered and stand on its own

ground. By the same token, if earlier decisions were reasonable and not negligent, a later decision cannot be found negligent on the ground that the earlier decision created the situation. This is "bootstraps" reasoning.

To be sure, each of the decisions must be viewed on the basis not only of what was known at the time it was taken, but also on the basis of what could then reasonably be anticipated for the future. However, once a decision is reasonably taken, allowance for expected future developments having been made, a later decision taken when developments turned out other than expected, is not rendered negligent because of the earlier decision, proper at the time *it* was made. The present case is one where the indulgence of hindsight must be particularly avoided because the decisions of the Gasbras Sul's captain depended upon the judgment of the men on the scene as to what the weather would do; and since the event proves that the weather did not do what they expected, for precisely that reason care must be taken to discount the effect of hindsight in weighing the reasonableness of the decisions as of the time they were taken.

2. The Court below erred in applying a hard and fast rule instead of judging the reasonableness of the decisions of the Gasbras Sul's captain.

A fundamental error of the Court below was in construing the meaning of the advice given to Captain Dahle by Esso's Mooring Master, Captain Jensen. As we have pointed out (Main Brief, pp. 12-14) Captain Dahle had been warned—and was fully aware of—the dangers of remaining overnight at the terminal, but there is no testimony that this warning meant, as the Trial Court viewed it (Opinion, pp. 10a-11a) that under no circumstances could a vessel remain overnight at the Terminal. Esso is in error in stating (Brief, p. 7) that no appeal has been taken

from this conclusion on the part of the Trial Court.* Indeed, this is one of the central issues of this entire case, namely, the discretion given to the master of a vessel calling at Esso's sea terminal at San Jose, Guatemala.

It is of vital significance that it was customary and usual for vessels to remain overnight at the Terminal in the "chubasco" season. Although Esso suggests (Brief, pp. 9-10), that this was not Mooring Master Jensen's standard or practice, the evidence is otherwise. As discussed in our Main Brief (p. 8), every vessel as to which there is any evidence *did* remain overnight at the Terminal in the "chubasco" season with Mooring Master Jensen aboard: the vessels next proceeding and following this incident, as well as the Gasbras Sul herself on previous calls. There was no evidence that *any* ship *ever* suspended discharging operations at the end of the day in order not to be at the mooring overnight in the "chubasco" season. The advice which Mooring Master Jensen gave Captain Dahle was not that he should suspend discharging, but that he should leave the Terminal "any time as soon as we were finished discharging" (Dahle, 45a), "when he is finished discharging, day or night he could leave, and should leave, the Terminal" (Jensen, 77a-78a); and the Trial Court so found: "Captain Jensen also advised Captain Dahle that he should leave the Mooring vessels as soon as he had completed discharge . . ." (Opinion, 7a). This does *not* mean "stopping the unloading before completion". And ships did not do so.

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* We stated, at page 14 of our Main Brief:

> "It is, we submit, clear from the foregoing testimony that what Mooring Master Jensen was talking about was an entirely different standard from that imposed by the Trial Court in holding that in view of the likelihood of 'chubascos', the vessel should not stay overnight, 'even if this meant stopping the unloading process before completion' (Opinion, 10a-11a)."

On the other hand, Captain Jensen's general advice with respect to stopping of discharge in bad weather *was not related to "chubascos"*. His testimony (analyzed at pages 12-14 of our Main Brief) was that a ship should suspend discharging and unmoor "if the weather was so bad that he could not *stay secure* in the Terminal", if "it is hard for his ship to *lay* in the Terminal" without "strain or damage" to the ship (80a, 82a, emphasis added). This had reference to the seasonal bad weather, swells and winds, prevailing at this time of the year, not to be sudden and unpredictable onslaught of a "chubasco". In other words, at Esso's Guatemalan Terminal vessels are moored close off an unprotected shoreline, with swells rolling in from the Pacific Ocean. If those swells and the wind caused the vessel to pound or drag anchor, then it would have to suspend discharge and leave. However, it is undisputed that this situation did not arise on the present occasion and at no time during the period when Captain Dahle's decisions were being made was the weather such that the Gasbras Sul was pounding or unable to remain secure. The weather had been changing off and on all day, "but not so heavy that we were afraid of anything, we were well moored up" (Dahle, 53a), it was "the best mooring we did there" (52a).

> "During the night (evening) the intensity of the squalls increased and sea and swells increased somewhat, but there was still no danger threatening and the mooring and anchors held well. Those from ashore who were on board were still of the opinion that this was the kind of rough weather which usually prevails during the month of September and that it would stay like that overnight and calm down a little in the morning as usual." (Dahle's Report, Ex. G-1, 141a)

Esso's entire argument, and the erroneous decision of the Court below, are predicated upon an absolute standard, for which there is no support in the evidence that under

no circumstances may a vessel remain overnight at the Terminal in the "chubasco" season. In fact, Esso's Brief as much as admits that this hard and fast rule arbitrarily imposed by the Court is without support in practice, since it is compelled to argue (pp. 9-10) that what other ships did does not justify or constitute a standard of conduct. The practice of other vessels, and particularly of Esso's own Mooring Master, surely does have a vital bearing upon the reasonableness of the decisions taken by Captain Dahle.

A shipmaster who considered himself bound not to remain at the Terminal overnight under any circumstances would be obliged to suspend discharging operations before dark no matter what the weather was. Captain Dahle's decisions, not to suspend discharging and not to leave after discharging was complete, were based upon a weighing of advantages, disadvantages, and risks. They are not, we submit, to be judged on the *assumption,* made by the Court below, that it was unreasonable under any circumstances to remain overnight even if conditions made that course appear less dangerous than leaving. The hard and fast rule imposed by the Court forecloses that option, and does so without basis in the evidence and in the face of the evidence as to the practice of other vessels.

Esso's own Mooring Master, Captain Jensen, refused to second-guess the decisions of a shipmaster on the scene or to impose a hard and fast rule. Captain Jensen testified that "Captain Dahle was to use his own judgment as a seaman" (82a), and he nowhere criticized Captain Dahle's decisions to remain. We submit that the Court below, and this Court, should similarly refrain from substituting their own judgment for that of Captain Dahle in the exercise of his discretion as the shipmaster on the scene.

> "The good faith of the master and his reasonable exercise of discretion must be considered and determined in the light of the facts in each particular case. The term *discretion* implies the absence of a

hard-and-fast rule. The establishment of a clearly defined rule of action would be the end of *discretion*, and yet discretion should not be a word for arbitrary will or inconsiderate action.

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"Courts, in passing upon such questions, should endeavor to put themselves in the position of the actors in the transaction, and not be ready to find that the course actually pursued was blameworthy because the results were unfortunate; what those concerned have a right to demand of a master, when confronted with unexpected emergencies, is not an infallible but a deliberate and considerate judgment. Mere good faith will not excuse him, if his decision turns out to have been wrong, but the result is not always a true criterion whether a man pursued a prudent course or not." *The Styria*, 186 U.S. 1, 9-10 (1901).

After discharge was completed, and the weather unexpectedly worsened, it was Captain Dahle's considered judgment that to attempt to leave was "dangerous, very dangerous" (Dahle, 44a). As found by the Court below (Opinion, 7a):

> "By the time the hoses were disconnected, at 9:30 P.M., the weather conditions were 'very bad'; the wind was much stronger, the sea was rougher, and a very heavy rain was falling. Captain Dahle believed at this time that it was too dangerous for the ship to leave the sea terminal, and he decided to remain until daylight."

The Trial Court agreed that "there undoubtedly were risks attendant on leaving, in daylight or in the dark" (Opinion, 11a), but concluded that Captain Dahle was negligent in weighing these known risks against the possible risk of "chubasco", on the ground that "reasonable seamanship could have successfully accomplished departure" (Opinion, 12a). Possibly it could, but this is by no means a proper basis to conclude that it was negligent for

Captain Dahle to determine not to leave in view of the serious dangers involved in leaving.

It is difficult to conceive of a worse example of the error of substituting the judgment of an expert who was not there (Appellee's Brief, p. 5), or of a Judge, not a seaman, who was not faced with the choice between dangerous alternatives with which Captain Dahle was faced. There were risks in either course. Captain Dahle weighed all the evidence, consulted with his officers and the local people (Mooring Master Jensen was off on another job for Esso and was not available to give Captain Dahle the benefit of his advice, 82a-84a), and decided that since the Gasgras Sul was well moored, under all the circumstances with which he was faced, the wiser of the two dangerous alternatives open to him was to remain at the mooring until daybreak. We submit that it was error for the Court below to substitute its own judgment for that of Captain Dahle and for the Court to determine that Captain Dahle had no choice but to take the other alternative.

In the same way, it was error for the Court below to condemn Captain Dahle's earlier decisions to continue discharging in the late afternoon and into the evening. The Court found as a fact that:

> "The captain apparently thought that the weather would hold up sufficiently, and he decided to finish unloading with the expectation that he would still be able to leave the sea terminal that night" (Opinion, 6a).

Obviously, no one could guarantee that the weather would not get worse and prevent departure, and therefore in effect the Trial Court's holding means that there was no discretion whatsoever, and that the Gasbras Sul was under an absolute duty to leave before dark, in order to fulfill an absolute duty not to remain in the Terminal after dark. But as discussed above, the evidence established no such hard and fast rule, and in the absence of such an absolute

standard, the decisions of Captain Dahle cannot, we submit, be held unreasonable. He based his decisions upon his knowledge of the weather conditions which had obtained throughout the day, his knowledge of the weather during his previous calls at Esso's Terminal, the San Jose Sailing Directions, the steady barometer, radio weather forecasts, and the advice of the local residents as to what the weather would do.

Under these circumstances, Captain Dahle's conclusion that the weather would hold up cannot be said to have been unreasonable, and his decision not to suspend operations cannot be faulted, except by imposition of a hard and fast rule that under no circumstances may a vessel remain overnight at the Esso Terminal in the "chubasco" season. But the fact that other vessels, and Esso's own Mooring Master, customarily did remain overnight discharging cargo establishes that the Court below erred in deciding that masters have no discretion, no choice, but must—no matter what—depart from the Terminal at the end of the day. Because the Court below thus substituted its own unrealistic absolute standard for practical seamanship, the Court never really came to grips with the reasonableness of the judgment exercised by the Master of the Gasbras Sul —first, that the weather would hold up and later, when discharging was complete, that the dangerous conditions made it safer to stay than to leave.

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POINT III

Under Guatemalan law there can be no recovery in the absence of negligence.

It is somewhat surprising—though perhaps understandable in view of the burden upon Esso to establish Guatemalan law—that Esso's Brief, in raising the issue of the interpretation of Guatemalan law, never even mentions [footnote omitted] what Judge Feinberg referred to as "the welter of confusing and often contradictory testimony" (Opinion, 9a) of the two Guatemalan attorneys who testified as to their interpretation of the Guatemalan law.

In view of his conclusion that the master of the Gasbras Sul was negligent, Judge Feinberg did not reach the issue of the applicability of the Guatemalan Accidents Law. The Court held that it need go only so far as to conclude that (Opinion, 9a-10a):

> "Under the law of Guatemala, negligence—in the same sense that the concept is used in Anglo-American law—is a basis for liability if that negligence proximately causes a collision between a vessel and a stationary object, which results in damage and a shipowner is responsible for the negligence of its captain."

Since neither party has appealed from the foregoing finding as to Guatemalan law, we take it to be common ground that unless the Accidents Law requires a different conclusion, this is the law governing the present case.

1. The Accidents Law is not applicable to the present case.

The first, and we submit conclusive, answer to Esso's contention that the Accidents Law imposes liability without fault, is that on its face the Accidents Law is not applicable to the present case, involving a private ship-

owner and a corporate property owner. Article 5 of the Law (Appellee's Appendix, p. 26) shows clearly that it was never intended that the Accidents Law be invoked in favor of a corporate plaintiff such as Esso. The major factors specified in Article 5 as governing the amount of damages to be recovered are the age, marital status, background, and occupation or profession of the "victim", and the legal obligations of the "victim" to provide support to others. The Preamble to the 1945 Amendment to the Law (*ibid.*, p. 29) reconfirms that the purpose of the Law is to "provide for the safety of persons that make use of public services of transportation" and to give a cause of action for damages resulting from "accidents or death" happening to such "persons". Surely Esso—of all "persons"—does not fit this picture of an accident victim!

On cross-examination and under questioning by Judge Feinberg (41c-43c), Esso's own expert witness, Mr. Viteri, had to admit that in the half century the Accidents Law has been on the books, "*there has never been a case of a corporation recovering under the Accidents Law*" or even "*filing a complaint under the Accidents Law*" (43c, emphasis added).

We submit that the Court below was properly reluctant to construe the Accidents Law to apply in a way which no Guatemalan Court has ever even been *asked* to apply it. It is perhaps significant that plaintiff, a Panamanian corporation, did not—so far as appears from the decision—urge the United States District Court for the District of the Panama Canal Zone that the Accidents Law applied to Esso's claim against the tanker Sabrina for damage done to a pipeline at San Jose in a "chubasco" the year before the Gasbras Sul accident, *Esso Standard Oil, S.A.* v. *The S.S. Sabrina*, 154 F. Supp. 721 (1957). Nor did plaintiff bring suit in the present case against the Gasbras Sul in the Courts of Guatemala, where, if Esso's contentions were correct, the entire question of negligence would be irrelevant. Mr. Viteri acknowledged that there has *never* been

a Guatemalan "case where a steamship company has been involved in liability under the Accidents Law" (38c-39c). This history of the *non*-application of the Accidents Law in the Courts of Guatemala is compelling reason, we submit, for the Courts of the United States to refrain from interpreting and applying the Law in the novel way now urged by Esso.

2. The Accidents Law does not impose liability without fault.

Even if this Court should decide to construe the Accidents Law to apply to Esso's claim in the present case, the extraordinary interpretation contended for by Esso is wrong. As noted above, Esso's Brief refrains from any mention of the testimony given at the trial by Guatemalan attorneys concerning the interpretation of the Accidents Law. We submit that the testimony, together with the provisions of the Accidents Law itself and other Guatemalan law, establishes that there can be no recovery under the Accidents Law in the absence of fault.

A leading Guatemalan attorney, Mr. Emilio Arenales, testified that the purpose and effect of the Guatemalan Accidents Law was to create a cause of action against the owner of a means of public transportation or dangerous instrumentality for damage caused by the fault of the person in charge of the vehicle (52c-55c, 72c-74c); the Law does *not* impose liability without fault (62c-63c, 68c-69c). As explained by Mr. Arenales, the operative language of the Accidents Law makes the owner responsible in the civil action with the perpetrator, and this is a "procedural right" of the victim, not the creation of a substantive right to recover (54c).

> "Now from this first paragraph of Article 1 I certainly do not and could not ever arrive at a conclusion that this means liability, that this means necessarily liability. I have the right to go to court,

> and what this article says is that two parties, these companies and the perpetrators or accomplices [or] the persons are in solidum *responsible*, but it does not say that they are in solidum *liable*. You have to prove in court that there is liability." (Emphasis and bracketed correction added.)

Professor Salazar, whose 1962 work on the then (and still) "proposed" new Code is discussed in Esso's Brief (pp. 30-31), unequivocally stated in a letter written in 1964 (Ex. U-1, 80c) that "present legislation" in Guatemala does *not* accept "the theory of civil responsibility when there is no fault".

The "objective theory of liability" urged by Appellee (Brief, p. 24) manifests itself in a number of different ways in the civil law, and in Prof. Salazar's view the manifestation of this principle in Guatemalan legal theory is not liability without fault, but simply "reversal of evidence" (63c), or "reversal of the proof" (Appellee's Appendix, p. 37), by creation of rebuttable presumptions of fault (see, *e.g.*, Port Regulation, Ex. 14-A, 81c). Eder's survey of Latin American law, relied upon by Appellee (Brief, p. 24), confirms that under civil law a plaintiff may be "relieved of the burden of proof" of negligence by a reversal of proof whereby "a duty is cast on the defendant to give an explanation of the accident and to show that it was due to no fault of his own or of his employees or agents" (Eder, "A Comparative Survey of Anglo-American and Latin American Law", p. 62). Another authority cited by Appellee (Brief, p. 23), defines the "objective theory" prevailing in civil law countries as one which holds that the "test for negligence" is the conduct of a reasonable person, as distinguished from the subjective conduct of the tortfeasor (Schwenk, "Common and Civil Law Systems", 33 No. Cal. L. R. 382, 393; in accord, Eder, *op. cit.*, p. 60). It is thus clear that notions of fault and negligence are *not* excluded by the objective theory of liability under Latin American law.

The Accidents Law itself nowhere states that it creates a liability without fault; the words "irrespective of fault or negligence" at page 22 of Appellee's Brief appear nowhere in the Law. Esso's expert witness Viteri, formerly Esso's regular attorney (14c-15c), acknowledged (19c, 33c) that this interpretation was added by him and is not in the wording of the Law. Mr. Viteri conceded (39c-40c) that Esso's interpretation of the Accidents Law, a 1906 statute, is inconsistent with the Port Regulations of 1939 (Ex. 14-A, 81c), which creates a rebuttable presumption of fault (Viteri, 34c) as the prerequisite to liability of a shipowner for damage to shore facilities.

In discussing three decisions of the Guatemalan Supreme Court (Brief, pp. 24-30), Appellee refers to summaries of the rulings of one of the lower courts, rendered during a six-month period in 1954 when Guatemala had a leftist government (Viteri, 37c), but these do not set forth the views of the Supreme Court. In none of the cases relied upon by Appellee (and it called the Court's attention to no others) does the Guatemalan Supreme Court rule upon the contention that the Accidents Law imposes liability without fault.*

In the *Empresa Electrica* case (121c et seq.) the Supreme Court of Guatemala held that the Accidents Law does *not* "contradict" the Guatemalan Civil Code (Article 2277, 85c), but on the contrary "harmonizes" with it "inasmuch as it determines that 'whoever . . . because of his acts, carelessness or negligence causes damage to another is obligated to repair it' " (130c). In thus interpreting the Accidents Law the Court followed the teaching of Article XV of Guatemala's Fundamental Precepts of Statutory Interpre-

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* In the *Shell* case negligence in the maintenance and operation of the defendant's vehicle was found as fact (114c-115c, 119c). The *Mini* and *Airplane* cases are not in point because the Supreme Court held the Accidents Law inapplicable and so did not construe it (97c-98c, 106c-108c).

tation (87c) that obscure provisions be clarified in accordance with the "dispositions of other laws in analogous cases" and in order to be "in accordance with equity and the general principles of Law".

The Civil Code (Art. 2295, 86c) specifically provides that there is no liability without fault. Under the Commercial Code (Art. 911, 83c) the captain of a vessel is liable for damages resulting from ordinary negligence (*"culpa levis"*, as defined in the Civil Code, Art. 1436, 84c), and a shipowner is jointly liable with the captain for the latter's acts, including crime, quasi-crime, or negligence (Art. 686 (4), 82c).

We submit that Esso's error in interpreting the Accidents Law is in failing to recognize its purpose of creating a right of action on the part of a person involved in an accident to bring home to a company engaged public transportation or a public utility, the fault of the "perpetrator" of the accident. It is significant that the vicarious liability provisions of the Civil Code (85c) do not apply to owners of vehicles or dangerous instrumentalities. The Accidents Law supplements this by extending the doctrine of *respondeat superior* to owners of means of public transportation and to all companies whose public-utility type activities "may produce damages due to the inexperience, drunkenness, maliciousness, ineptness or carelessness of the employees or because of the bad condition of their machines, lines, or equipment" (Appellee's Appendix, p. 31). This is hardly liability without fault.

The 1945 amendment to the Accidents Law (Decree No. 178, Appellee's Appendix, pp. 29-30) further demonstrates that the Law is not intended to impose liability without fault, because it changed Article 5 specifically to require the courts to take into account, in determining the amount of the recovery:

> "the degree of responsibility for the carelessness, negligence or bad service attributable to the company or owners for the accident."

Thus the Accidents Law as amended in 1945—like the Port Regulation of 1939, discussed above—does *not* impose liability without fault, but provides a type of reversal of proof, the rebuttable presumption of fault on the part of the owner, noted by Schwenk as being found in civil law *respondeat superior* legislation:

> "* * * the doctrine of respondeat superior may be qualified in the civil law by the proviso that the superiors may exonerate themselves from liability by showing that they exercised due care in selecting and supervising the tortfeasor" (Schwenk, "Common and Civil Law Systems", 33 No. Cal. L.R., at 395).

For the reasons discussed above, we submit that the Guatemalan Accidents Law of 1906, as amended, did not and does not impose liability without fault, except in the sense that a company which itself is without fault may be held liable for damages resulting from the fault of the person in charge of a vehicle or vessel, the sort of vicarious liability familiar under our own law of *respondeat superior.*

If, however, this Court should interpret the Accidents Law to hold that it imposes liability without fault and that it is applicable to the present case—both of which interpretations we dispute—the effect of such holding would not be to require affirmance as urged by Esso (Brief, p. 21), but to require a determination under Article 5 of the Accidents Law with respect to the factors which govern the amount of the damages to be recovered: That is, the financial need of the "victim", Esso Standard Oil, S.A., and the degree of responsibility on the part of the Gasbras Sul's owners for whatever negligence the Court may find.

Under the circumstances, we submit, both factors militate towards reduction of damages to the vanishing point, since this is not the case of the indigent head of a household injured in a public transportation accident through the failure of company equipment or "inexperience, drunkenness, maliciousness, or ineptitude or carelessness" of a driver, the situation which the Accidents Law was intended to ameliorate.

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